Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-953

PEYTON BERBLING, INDIVIDUALLY AND AS STATE'S ATTORNEY FOR ALEXANDER COUNTY, ILLINOIS (W. C. SPOMER, SUCCESSOR TO PEYTON BERBLING), EARL SHEPHERD, INDIVIDUALLY AND AS INVESTIGATOR FOR PEYTON BERBLING, CARL MEISENHEIMER, AS POLICE COMMISSIONER OF THE CITY OF CAIRO, ILLINOIS, MICHAEL O'SHEA, AS MAGISTRATE OF THE CIRCUIT COURT FOR ALEXANDER COUNTY, ILLINOIS, AND DOROTHY SPOMER, AS ASSOCIATE CIRCUIT JUDGE FOR ALEXANDER COUNTY, ILLINOIS,

Petitioners,

vs.

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, BY HIS FATHER AND NEXT FRIEND, HOBERT LAMBERT, MORRIS GARRETT, BY HIS FATHER AND NEXT FRIEND, LEVI GARRETT, INDIVIDUALLY AND AS REPRESENTATIVES OF A CLASS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners, Michael O'Shea and Dorothy Spomer, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Seventh Circuit, entered in this proceeding on October 6, 1972.

OPINION BELOW.

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Eastern District of Illinois appears in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1972. On November 3, 1972 petitioners filed with the Court of Appeals a Motion for Recall and Stay of the Mandate pending a petition for certiorari in this Court. The Court of Appeals on November 7, 1972, denied the Motion. On November 22, 1972, petitioners filed an application for Stay of Mandate with the Honorable William H. Rehnquist which was granted on November 28, 1972. On December 11, 1972 this Court sitting *en banc* affirmed the stay of mandate as it applied to O'Shea and Spomer. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether the common law doctrine providing for judicial immunity for judicial acts in the exercise of legal discretion was abolished by Congressional civil rights enactments where mandatory injunctive relief is sought.

2. Whether a class may maintain an action for mandatory injunction against a state court judge for an alleged past discriminatory predisposition where no allegation has been made that any member of that class has been injured or been before that judge in any proceeding.

3. Whether in view of the historic comity relationship between federal and state judicial systems, a federal district judge may establish guidelines to control the exercise of lawful state judicial discretion in future criminal matters based upon a civil suit in equity generally alleging a past discriminatory predisposition to that class.

4. Whether a class may maintain an action for mandatory injunction against a state court judge for an alleged past discriminatory predisposition upon a complaint which alleges only general and conclusatory allegations and evidences no instance of such conduct.

STATUTES INVOLVED.

42 U. S. C. §§ 1981, 1982, 1983 and 1985, are reprinted in full in the Appendix at pages 61-63.

STATEMENT OF THE CASE.

Petitioner, Michael O'Shea, a Magistrate of the Circuit Court of Alexander County, Illinois, and Dorothy Spomer, an Associate Circuit Judge for Alexander County, Illinois, were made defendants to a Civil Rights Action charging that they and others, as law enforcement functionaries of Alexander County, have engaged in patterns and practices of conduct in the administration of criminal justice so as to systematically discriminate against respondents and their class on the basis of race, thereby interfering with respondents' First, Sixth, Eighth, Thirteenth and Fourteenth Amendment rights and in violation of 42 U. S. C. §§ 1981, 1982, 1983 and 1985. The Amended Complaint in the first, second, third, and fourth claims for relief set out eleven specific acts of alleged discriminatory conduct on the part of defendant State's Attorney Berbling and investigator Shepherd. The sixth claim for relief contains

general and conclusatory allegations against these petitioners which reveal no specific references whatever to any past discriminatory conduct of either petitioner.

The alleged conduct includes: (a) that petitioners set bond in criminal cases by following an unofficial bond schedule without regard to the facts of the case or circumstances of an individual defendant, (b) that petitioners sentence black persons to longer criminal terms and impose harsher conditions than they do for white persons who are charged with the same or equivalent conduct, and (c) that petitioners require respondents and members of their class to pay for a trial by jury when charged with violations of city ordinances which carry fines and possible jail penalties, if the fine cannot be paid.

Though the Complaint alleges in paragraph 36 (b) that O'Shea and Spomer sentence black persons to longer terms and impose harsher conditions than for white persons similarly charged, the Complaint does not mention a single instance of such conduct in the past nor does it charge that the sentences were not within the petitioners' lawful discretion. The respondents evidence no request for relief either by *habeas corpus* or appellate review by any member of their class or for anyone else for any past judicial discrimination by either Spomer or O'Shea. In the absence of any specificity as to alleged past conduct we can only assume the language used expressed a fear of possible discrimination in the future. This is borne out by the prayer for relief to enjoin these petitioners "from depriving plaintiffs of their constitutional rights as set forth in paragraph 36".

Allegations (a) and (c) do not state that respondents are treated any differently than any other persons. Allegation (a) above generally charges that petitioners follow an unofficial bond schedule in criminal cases; no charge

is made as in (b) above that there exists discrimination as between white and black persons. In addition, the Court of Appeals itself expresses doubt as to the meaning of allegation (c) in footnote 1, page 5 of the Court's Opinion (App. 6). In sum, the issue as drawn by the pleadings relates only to allegation (b) above, i.e. a judge's discretionary role in imposing sentence on a lawfully convicted defendant. The unsworn complaint alleges no factual situations involving judges and contains only one allegation of discrimination by judges—that in paragraph 36(b) of the Amended Complaint which is alleged only on information and belief. Since this petition is filed solely on behalf of the two judges, O'Shea and Spomer, the question is limited to the allegations as set forth above.

The District Court dismissed the Complaint on March 23, 1971, on the grounds that (1) it lacked jurisdiction to entertain a cause seeking to have a federal court substitute its judgment for the judgment of the state judiciary, and (2) in the regular performance of their duties, judicial immunity barred relief in an action under the Civil Rights Act. A copy of the District Court's opinion is set forth in the Appendix, pp. 56-60. On October 6, 1972, the Court of Appeals in a two to one decision reversed the judgment of the District Court holding that a federal district court may entertain actions requiring federal supervision and regulation by mandatory injunction over the discretion which state court judges may lawfully exercise within the limits of authority granted them by law. The Court held that: 1) the Complaint stated a cause of action against these petitioners cognizable under 42 U. S. C. §§ 1981, 1983 (and perhaps § 1982), and (2) the doctrine of judicial immunity did not extend to petitioners in light of the legislative history of the Civil Rights Acts of 1866 (April 9, 1866, 14 Stat. 27) and the Ku Klux Klan Act of 1871 (April 20, Ch. 22, 17 Stat. 13) where injunctive relief is sought. A copy of that opinion is available in the Appendix pp. 1-55.

On November 3, 1972, petitioners filed with the Court of Appeals a motion for recall and stay of the mandate pending a petition for certiorari in this Court. The Court of Appeals on November 7, 1972 denied the motion.

On November 22, 1972, petitioners filed with the Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States, an application for stay of the mandate of the Court of Appeals. On November 28, 1972 the stay was granted. Subsequently, on December 11, 1972 this Court sitting *en banc* affirmed the stay of mandate as it applied to O'Shea and Spomer.

REASONS FOR GRANTING WRIT.

I.

The Two to One Decision of the Court Below Is Contrary to Controlling Decisions of This Court and the Great Weight of Authority in the Federal Courts.

In reliance upon what it conceived to be an historical imperative, the Seventh Circuit has here held that a federal district court may entertain actions for mandatory injunctions under 42 U. S. C. § 1983 against a state court requiring supervision and regulation over the discretion which it may lawfully exercise within the limits of authority granted it by law. Holding that the venerable doctrine of judicial immunity did not extend to state judicial members, where injunctive relief is sought, the Court of Appeals selectively recounted the history of the Civil Rights Act of 1866 (April 9, 1866, 14 Stat. 27) and the Ku Klux Klan Act of 1871 (April 20, 1871; Ch. 22, 17 Stat. 13) (See Appendix, pp. 12-16 and 17-20) as it appears substantially in *Monroe* v. *Pape,* 365 U. S. 167 (1961).

The Court of Appeals surmised that the words "any person" in § 2 of the Civil Rights Act of 1866 seemed to

include state judges and that in considering criminal sanctions Congress clearly had decided to, eliminate judicial immunity (App. 14). Yet, in reviewing the debates in their entirety it becomes clear that Congress became rent with discord on that subject. At least for the purposes of state judges, the debates concentrated upon whether a state court judge could be held criminally liable for the enforcement of state statutes which were discriminatory. Even the Court below cited the comments of Illinois Senator Trumbull, the bill's principal sponsor, wherein he stated:

> ". . . I admit that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under color of an *illegal act*, may be and ought to be punished; but if he acted innocently, the judge would not be punished." (emphasis added) (App. 13, 14).

It is evident that the Senator was referring to liability only if a judge was acting pursuant to a state law or custom which was illegally discriminatory. Statements of other Congressional members[1] and, in addition President Johnson,[2] who vetoed the bill, indicate that their objections were grounded upon this premise.

The case of *Monroe* v. *Pape*, 365 U. S. 167 (1961) at page 497 decisively established the view that the "under color of law" provision of § 1983 applied to unconstitutional actions taken without state authority as well as to unconstitutional action authorized by the state. In that case police officers had searched a home without a warrant, arrested and detained the plaintiff without arraignment. They argued that they had acted outside state law, custom

1. Cong. Globe, 39th Cong., 1st Sess. (1866) Senator Cowan (Pa.) at p. 475; Senator Hendricks (Ind.) at 602; Mr. Raymond at 1267, Senator Johnson (Maryland) at 1778; Mr. Stewart (Ga.) at 1782.

2. Cong. Globe, 39th Cong. 1st Sess. (1866) at 1680.

or usage and therefore had not acted under "color of" state authority, thereby preventing federal jurisdiction. This Court rejected that view decisively. However, *Monroe* did not discuss the doctrine of the judicial immunity exception to the Civil Rights Act and is not dispositive since that issue was not before the Court. Little solace can be afforded the notion that *Monroe's* historical analysis elucidates the topic of judicial immunity in light of this Court's holding in *Pierson* v. *Ray,* 386 U. S. 547 (1967). Manifest in the historical analysis of *Monroe* is the absence of the debates concerning judicial officers and their immunities. Moreover, in light of *Bradley* v. *Fisher,* 13 Wall. 335 (1872) and *Tenny* v. *Brandhove,* 341 U. S. 367 (1951), the extension of the doctrine in the *Monroe* decision to judges and legislators would have been evidenced in that opinion.

In 1967, this Court held in *Pierson* v. *Ray, supra,* at pp. 553-5, that the common law immunity of judges from civil action for acts committed within their judicial jurisdiction was so settled a principle as to be excepted from the provisions of § 1983. Furthermore, this Court passed upon the legislative history, which the Court below held to be so incisive, and found that history wanting, so much so that it "gives no clear indication that Congress meant to abolish wholesale all common-law immunities." Mr. Chief Justice Warren expressed the feelings of eight members of the Court when he wrote:

> ". . . we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

Conspicuously, the defendant-judge in *Pierson* was alleged to have conspired with police officers to deprive the plaintiffs of the civil rights. This Court noted, at p. 553, that the record was barren of any proof or specific allegation that he played any role in the arrests and convic-

tions other than to adjudge the plaintiffs guilty when their cases came before his court. The proof of conspiracy never went beyond the suggestion that only inferences could be drawn from the judge's judicial decisions, and this the Court felt was not enough (see footnote 8, p. 554). In the cause at bar only a course of conduct is alleged where, at best, no more than a similar inference could be drawn.

The Court of Appeals draws the narrow distinction that while judges are immune from damage suits, they remain liable by mandatory injunction if ever anyone should allege class discrimination to the federal courts. Petitioners submit that no distinction lies as to judicial immunity for damages and injunctive immunity for a judge's lawful exercise of his discretion and that this Court's rationale in *Pierson* is poignantly applicable:

> "This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' (Scott v. Stansfield, LR 3 Ex 220, 223 (1868), quoted in Bradley v. Fisher, supra, 349; note, at 350, 20 L. ed. at 650.) It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray, supra,* at 553, 554.

While admitting that the question of injunctive relief under § 1983 had been considered by only a very few courts (see App. 31, 32), the Seventh Circuit cited *United States* v. *Clark,* 249 F. Supp. 720 (S. D. Ala. 1965), *United States*

v. *McLeod*, 385 F. 2d 734 (5th Cir. 1967), *Phillips* v. *Cole*, 298 F. Supp. 1049 (N. D. Miss. 1968) and *Bramlett* v. *Peterson*, 307 F. Supp. 1311 (M. D. Fla. 1969) as ample precedent for its holding.

However, the cases cited by the majority in which the doctrine of equitable relief has been applied, the relief granted has been in the form of a prohibitory injunction confining the state officials to the limits of their legal authority. Judge Dillon persuasively argued in his dissent below (App. 48) that "[T]here is a great difference between ordering an official not to do a particular act, measured by objective standards, and in ordering him to exercise his discretion in a certain way, measurable only by subjective standards".

U. S. v. *Clark, supra*, decided before *Pierson* v. *Ray, supra*, held that a preventative injunction would lie against the state judges where the United States sought an injunction under § 206(a) of the Civil Rights Act of 1964, against interference with both the right to vote and interference with the rights of a citizen to use places of public accommodations. This seminal case, though never decided by a higher appellate court, dismissed out of hand the doctrine of judicial immunity and founded its decision on *U. S.* v. *Wood*, 295 F. 2d 772 (5th Cir. 1961), *cert. denied* 369 U. S. 850. The relief granted, however, in *Wood* was based upon a mandatory injunction statute, 42 U. S. C. § 1971(b), where the right of action was given to the *United States* to prevent intimidation of citizens registering to vote. The question of immunity was not before the court.

Furthermore, the *Clark* court, while acknowledging principles of comity (at p. 729), pronounces that "no State official is immune from having his conduct challenged" (citing cases, p. 727). Yet, *Clark*, under the aegis of 42 U. S. C. § 1971 of Title II of the 1964 Act (not § 1983),

confessed that no interference with judicial discretion occurred since the action taken was merely to *prevent* trial, not to exercise the judge's control of it.

U. S. v. *McLeod,* 385 F. 2d 734, 738 n. 3 (5th Cir. 1967), citing *Pierson* in a footnote and recognizing *Clark* in the text, concerned the arresting and prosecuting of Black citizens who had been active in voter registration. The facts of *McLeod* demonstrated that local officials had harassed and attempted to intimidate Black citizens from exercising their right to vote. Under the auspices of 42 U. S. C. § 1971(b), the United States sought an injunction to prevent prosecution of these arrested persons because prosecution violated § 1971(b) since the trial judge did not decide the case on the statutory standard. The Fifth Circuit commented:

> "It is clear, however, that acts may violate section 1971(b) even though they deprive no one of his constitutional rights. Acts otherwise entirely within the law may violate the statute if they have the proscribed effect and purpose. (citing cases) The inquiry, therefore, is not whether the defendants have transgressed the Constitution. It is whether they have violated the statute." *U. S.* v. *McLeod, supra,* at 740.

The Court below referred briefly to *Phillips* v. *Cole,* 298 F. Supp. 1049 (N. D. Miss. 1968) as demonstrative of the issue before this Court (App. 32). However, in *Phillips,* the plaintiffs were engaged in civil rights activities and sought injunction against two state judges and their successors from failing to advise them of their right to counsel. This case clearly involved a preventative injunction, compelling the justices to perform a *ministerial* duty, the absence of which violated the Sixth Amendment.

In *Bramlett* v. *Peterson,* 307 F. Supp. 1311, 1321-22 (M. D. Fla. 1969), plaintiffs sought a class action to enjoin state judges from failing to advise indigent misdemeanants

of their right to court-appointed counsel. The district court characterized its action preventative and claimed ample precedent in *U. S.* v. *Clark, supra,* and *Phillips* v. *Cole, supra.* Yet, in *Bramlett* the court limited its injunctive relief since "there is no infringement of the judicial function or judicial discretion; rather, this order affects the peace justice *only if he fails to exercise a mandatory, non-discretionary, and ministerial duty.*" (emphasis added).

In effect, then, most of the Court of Appeals' authority for injunctive relief rests on cases which follow the district court case of *U. S.* v. *Clark, supra,* except, e.g., *Ex parte Virginia,* 100 U. S. 347 (1879), which labelled the activities of Judge Cole "ministerial" and left no doubt that the aggrieved behavior was not discretionary. (see *Virginia,* pp. 348-9)

Albeit an exhaustive study of injunctive relief under § 1983 was made by the Court below, the discordant case of *MacKay* v. *Nesbett,* 285 F. Supp. 498, 502, 503 (D. C., Alaska, 1968), affirmed 412 F. 2d 846 (1969), cert. denied 396 U. S. 960, was inadvertently overlooked. In that case an equitable proceeding was brought against a majority of the justices of the Alaska Supreme Court to have a final order suspending plaintiff from the practice of law for one year declared null and void and to enjoin its effect. Jurisdiction was invoked under the Civil Rights Act (28 U. S. C. § 1343), 42 U. S. C. § 1983, and under the Federal Questions Statute (28 U. S. C. § 1331). Upon consideration of a motion to dismiss, the district court evaluated the jurisdictional question on two grounds: (1) the anti-injunction statute, 28 U. S. C. § 2283, (2) judicial immunity, and found either ground sufficient to grant dismissal. While the Court's position in *MacKay* as to 42 U. S. C. § 2283 is no longer tenable in light of *Mitchum* v. *Foster,* 40 U. S. L. W. 4737, (U. S. June 19, 1972), the Court's analysis of judicial immunity and § 1983 remains compelling.

Reaffirming the tenet of judicial immunity for judicial acts, the Court held "[T]he Civil Rights Act creates no exception to this immunity," citing *Pierson* v. *Ray, supra, Sires* v. *Cole,* 320 F. 2d 877 (9th Cir. 1963), *Johnson* v. *MacCoy,* 278 F. 2d 37 (9th Cir. 1960), *Hagan* v. *State of California,* 265 F. Supp. [illegible] (C. D. Cal. 1967).

> "The doctrine of judicial immunity applies to a proceeding in which injunctive or other equitable relief is sought, as well as to suits for money damages. (citations omitted) The reasons for the rule of judicial immunity apply regardless of the nature of the relief sought." *MacKay* v. *Nesbett, supra,* at 503.

The application in *MacKay* of the damages rationale to equitable relief where judicial entailment exists, demonstrates the viability of the immunity doctrine and the incongruous positions held by the Ninth Circuit and Seventh Circuits. These conflicts justify the grant of certiorari to review the judgment below. Petitioners submit that the damage proscription should apply where a class as exists herein attempts to invoke the provisions of § 1983 to enjoin a state judge based upon alleged past discriminatory conduct where he has acted within his discretionary powers granted him by law.

The reasoning in the ancient case of *Bradley* v. *Fisher,* 13 Wall 335, 80 U. S. 649, 650 (1871) is no less potent today:

> ". . . For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the

weakness of judicial authority in a degrading responsibility. *Taaffe* v. *Downes*, 3 Moore, P. C. 41, n.

* * * * *

"Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. . . .

* * * * *

"If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; . . ."

II.

The Decision Below Raises Significant and Recurring Problems Concerning the Historic Relationship of the Federal and State Judicial Systems.

At present, the Seventh Circuit countenances actions, the consequences of which permit a federal district judge to pass judgment upon whether a state court judge has exercised lawful discretion in criminal proceedings. This decision opens the door to wholesale federal analysis of lawful state criminal convictions. The effect of permitting actions against the state judiciary in the exercise of their lawful discretionary authority would be to irreparably harm the administration of criminal justice at the state level and erode the historic relationship between state and federal judicial systems.

Petitioners do not contend that federal courts may not grant equitable preventative relief in criminal actions. This area is well settled.[3] However, they challenge the decision of the Court below: (1) permitting class equitable relief to those who have never appeared before nor been affected by petitioners' rulings, and (2) permitting equitable relief based upon past and possible future discretionary conduct.

In effect, then, the Seventh Circuit's position leads to the egregious result that any group (whether injured or not) may seek an injunction in federal court against a state judge whom they feel has a past record of sentencing or inclination antipathetical to them. Therefore, it is not too remote to propose that a group e.g. Mexican-American citizens, Italian-American citizens, Jewish citizens, Puerto Rican citizens, Irish-American citizens, white-Anglo-Saxon-American citizens, *ad infinitum*, could also compel a state judge to defend his discretionary past conduct before a federal district judge. Extending the possibilities sanctioned by the Court below to its most absurd result, a state court judge could literally spend so much time defending his actions in frivolous suits at the federal bar that he could not perform his state judicial duties! See especially: *Greenwood* v. *Peacock*, 384 U. S. 808 at 832 (1966).

The action countenanced by the Court below will result in the federal courts sitting no only in review of state discretionary decisions but as a court of appeal from the state criminal trial. Though the action sanctioned here is civil, it requires the review of past *criminal* decisions. In addition, the likelihood is great that similar class actions would be taken to the district courts from state criminal actions on the grounds that the judge will or has a propensity to discriminate against his particular group. The

3. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), *Younger* v. *Harris*, 401 U. S. 37 (1971), *Boyle* v. *Landry*, 401 U. S. 77 (1971).

result, then, is to exchange state remedies[4] in favor of district court review.

The Court below tempered its holding, however, by proposing guidelines for the district courts (App. 46):

> "Nevertheless, as this appears to be a case of first impression as to the type of relief approved, we feel obligated to give the district court some guidelines as to what type of remedy might be imposed. We do not mean to require the district court to sit in constant, day-to-day supervision of either state court judges or the State's attorney. An initial decree might set out the general tone of rights to be protected and *require only periodic reports of various types of aggregate data on actions* on bail and sentencing and dispositions of complaints." (emphasis added)

The effect of the decision of the Seventh Circuit will be to "chill" judicial decision in the disposition of justice in the state of Illinois; in effect, then, a state judge must "look over his shoulder" each time he exercises his discretion, as he may properly do by law, for fear that by some nebulous standard of statistical analysis he has not meted out "justice" in accordance with a federal district judge's personal formula. In addition, a state judge would be more apt to qualify or balance sentences or amounts of bail in accordance, not with what the circumstances may have warranted, but with the nagging fear that leniency or strictness (irrespective of whether deserved) over a period of time would be interpreted as deliberate discriminatory conduct.

Subjecting a state judge to federal review each time a dissatisfied but lawfully convicted defendant alleges class discrimination would require federal courts to conduct an evidentiary hearing to determine whether a pattern of discrimination existed. A judge operating under an abstruse

4. e.g. change of venue, appellate review, removal (See Argument p. 21, n. 7).

order not to discriminate in fixing bonds and sentencing would find himself confronted with the possibility of a federal contempt citation and the necessity to defend his motivation in each case. The burden on the federal system would be, in the least, cumbrous and unworkable. The effect on the state system would be to create an oppressive atmosphere of federal supervision, cf., *Greenwood* v. *Peacock,* 384 U. S. 808 (1966), and render it oftentimes impotent.

Petitioners submit that subjecting state court judges to federal supervision violates the historic comity relationship between the federal and state judicial systems and presages the dilemma of interference with Article 4, § 4 of the United States Constitution,[5] Cf., *Bauers* v. *Heisel,* 361 F. 2d 581 (3rd Cir., 1966).

Mandatory injunction in the case at bar as effectuated by the court below places the discipline of Illinois state court judges in the hands of the federal district courts, rather than the people of the state by whom they are elected.[6]

The overall result of subjecting the state judiciary to federal review under these circumstances will be to undermine state dispensation of criminal justice and the citizen's belief that justice is being done. In the words of a great English jurist:

> "It is not enough that justice be done, but that the people are assured that justice is being done."

Petitioners submit that the decision below dissipates the effectiveness of the doctrine of comity. The Court of Appeals has held that though the principles of *Younger* v.

5. "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." *See also,* The Federalist, pp. 236, 303-305, 447 et. seq., 494 et seq.

6. The Illinois Courts Commission provides for disciplinary supervision by the Illinois Supreme Court. *See also,* Illinois Constitution of 1970 Article VI, Sections 9(b) and 9(c).

Harris, 401 U. S. 37 (1971) do not control this civil action, if it did "the plaintiffs' allegations are sufficient to come within the 'exceptional circumstances test' . . ." (App. 34) Yet, the amended complaint makes only general and conclusatory statements of bad faith and no instance of where it could have occurred is even alleged. In addition, respondents' claim of irreparable harm is illusory since not one member of the class has clearly shown injury.

While reciting the recent case of *Mitchum* v. *Foster*, *supra* (at 4742), the Seventh Circuit was remiss in overlooking this Court's declaration:

> "In so concluding, we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding. These principles, in the context of state criminal prosecutions, were canvassed at length last Term in *Younger* v. *Harris*, 401 U. S. 37, and its companion cases. They are principles that have been emphasized by this Court many times in the past. *Fenner* v. *Boykin*, 271 U. S. 240; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45; *Watson* v. *Buck*, 313 U. S. 387; *Williams* v. *Miller*, 317 U. S. 599; *Douglas* v. *City of Jeannette*, 319 U. S. 157; *Steffanelli* v. *Minard*, 342 U. S. 117; *Cameron* v. *Johnson*, 390 U. S. 611."

Assuming, *arguendo*, that injunctive relief could issue, petitioners present that in the case herein, the juxtaposition of judicial discretion in past criminal cases and a later civil action are so intermingled as to warrant the strict application of the *Younger* v. *Harris*, *supra*; *Boyle* v. *Landry*, 401 U. S. 77 (1971); and *Perez* v. *Ledesma*, 401 U. S. 82 (1971) standards for federal intervention.

III.

Even if it is Contended, Contrary to the Decisions of This Court, That Judicial Immunity for Discretionary Acts of a Judge Does Not Apply in Civil Rights Cases, the Opinion of the Court Below by Its Own Language Was Improper on the Record in This Case.

As analyzed above, controlling decisions of this Court as well as the great weight of authority in all federal courts hold that judicial immunity for discretionary acts still exists in civil rights cases.

As set out in the Statement, the complaint in this case recited eleven specific acts of alleged discrimination on the part of defendants, State's Attorney Berbling and investigator Shepard. They were charged with failure to file warrants or to prosecute eight white men who allegedly had threatened or assaulted some of the respondents. The complaint does not allege that any of the eight white men had ever been in court nor did it allege that any of the respondents had ever been arrested, tried or sentenced before these petitioners. Indeed, the complaint fails to allege that any specific individual had ever been arrested, tried or sentenced in the past and so fails completely in alleging any specific case against the two judges, petitioners herein.

The Court below (Appendix 2) said it must "consider all of the factual allegations to be true, resolving any doubts in Plaintiffs' favor." On Appendix 6 the Opinion states ". . . in Civil Rights Act cases, highly specific factual averments are required to defeat a motion to dismiss, otherwise every complaint against a state official by the simple expedient of averring conclusions would be cognizable in the federal courts. . . ." Yet, there was not a single factual averment as to trials or sentences in the past but only an apparent fear of discrimination against some-

one in the future. In addition, there were no averments whatever as to discrimination in setting bonds or requiring juries, yet the Court below on Appendix 21 states: "... it is clear that the complaint does state a cause of action against the judges under 42 U. S. C. §§ 1981, 1983 (and perhaps under 42 U. S. C. § 1982) since the judges are alleged to have imposed heavier fines and sentences and higher bails on plaintiffs' class than on the white citizens of Cairo."

On the basis of the record in this case—no specific charge of any past discrimination against anyone by either petitioner—the opinion of this Court in *Boyle* v. *Landry*, 401 U. S. 77 is very significant. On page 81 the Court said:

> "... the normal course of state criminal prosecution cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here."

The analogy of the two cases is shown by the statement on page 80 in the *Boyle* opinion:

> "Not a single one of the citizens who brought this action had ever been prosecuted, charged or even arrested under the particular intimidation statute ..."

On page 81, this Court continued:

> "... the complaint contains no mention of any specific threat ..."

Since the lower court was clearly correct in stating "highly specific factual averments are required to defeat a motion to dismiss", it was clearly wrong in finding against these petitioners.

The complaint not only failed to make any specific charge of past discriminations by either petitioner against

anyone, but also failed to allege any relief had been sought against either petitioner by way of *habeas corpus* in the federal court or appellate review or otherwise under Illinois procedures available to them.

The Illinois Constitution provides unusually broad procedures to investigate any alleged improper conduct of judges.[7]

Under these constitutional provisions, anyone of the respondents could have filed a complaint had there been any improper conduct of either petitioner. Such a complaint would be investigated without cost to the complainer by this non-partisan board consisting of seven laymen and two judges. If the complaint had substance, proceedings to censure, suspend or remove the judge would be filed with the Courts Commission.

These constitutional provisions were designed to permit an early thorough investigation by an impartial board of any complaint that any judge had acted improperly. The complaint in this case not only failed to allege any specific act of alleged discrimination against either of these petitioners, but likewise failed to allege any federal court

7. The Constitution of Illinois in Article VI, Section 15, provides:

"(b) A Judicial Inquiry Board is created. The Supreme Court shall select two Circuit Judges as members and the Governor shall appoint four persons who are not lawyers and three lawyers as members of the Board. No more than two of the lawyers and two of the non-lawyers appointed by the Governor shall be members of the same political party.

"(c) The Board shall be convened permanently, with authority to conduct investigations, receive or initiate complaints concerning a Judge or Associate Judge, and file complaints with the Courts Commission. The Board shall not file a complaint unless five members believe that a reasonable basis exists (1) to charge the judge or Associate Judge with willful misconduct in office, persistent failure to perform his duties, or other conduct that is prejudicial to the administration of justice or that brings the judicial office into disrepute . . . The Board shall prosecute the complaint."

action by *habeas corpus* had been necessary, that any appeal in a state court had ever been taken, or that any complaint had ever been filed against either of these petitioners, either by any of the respondents or by anyone else who had been before them. The complete absence of any such allegations, indicates the complaint was truly based on "flimsy allegations" which did not warrant interference by a federal court.

While the federal courts have specifically stated that exhaustion of state remedies is not a prerequisite to federal involvement, *Carter* v. *Stanton*, 405 U. S. 669 (1972); *Sinclair* v. *Henderson*, 435 F. 2d 125 (5th Cir. 1970); *Moreno* v. *Henckel*, 431 F. 2d 1299 (5th Cir. 1970); *Little* v. *Schafer*, 319 F. Supp. 190 (D. C. Tex. 1970); however, cf. *Kostohryz* v. *Hursh*, 329 F. Supp. 319 (D. C. Minn. 1971) and *Moore* v. *Frazier*, 316 F. Supp. 318 (D. C. Neb. 1970), petitioners suggest that in light of the historic relationship of state and federal judiciaries, federalism would require that a balance be struck where a state such as Illinois provides ample methods for relief when discriminatory judicial conduct is alleged.

IV.

Members of Respondents' Class Have Suffered No Injury by Actions of Petitioners and Have No Standing to Seek Injunctive Relief.

Some members of respondents' class have specifically alleged instances of discrimination against State's Attorney Berbling and investigator Shepherd, yet none claim, allege, or infer that they have been before petitioners Spomer or O'Shea and have been discriminated against. While petitioners do not pass upon the possible sufficiency of the class as to Berbling and Shepherd, they submit that respondents have not satisfied Rule 23, Federal Rules of Civil Procedure, 28 U. S. C. Persons who desire to repre-

sent a class must be able to show injury to themselves and not merely that it might happen to someone else. *Kansas City, Mo.* v. *Williams,* 203 F. 2d 47 (8th Cir. 1953), certiorari denied 346 U. S. 826, *Anderson* v. *Kelly,* 32 F. R. D. 355 (D. C. Ga. 1963), *Conley* v. *Gibson,* 29 F. R. D. 519 (D. C. Tex. 1961), *Wilson* v. *Kelley,* 294 F. Supp. 1005 (D. C. Ga. 1968), affirmed 393 U. S. 266.

Were respondents' class permitted to seek injunctive relief as constituted in the Amended Complaint, the spectre of the inundation of the federal courts would loom large. As noted above, ever state court judge would be subject to federal injunctive proceedings instigated by an assortment of groups based upon their conception and interpretation of his record and temperament.

Reduced to basics, this Court is faced with the question, "Should a district judge order a prior restraint of future judicial discretion of a state judge upon unsworn allegations of the reputation of such judge?" We respectfully suggest that the district judge here properly denied such request, for the preservation of the salutory doctrine of judicial immunity in matters of judicial discretion, for the maintenance of respect for the state judiciary by litigants, and the proper handling of the enormous case load in the state courts.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment of the Seventh Circuit and the significant problems concerning the historical station of federalism and the judicial immunity doctrine.

Respectfully submitted,

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